Mental Health Services, Northwest, Inc. *and* District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL–CIO. Case 9–CA–25564

December 20, 1990

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On April 21, 1989, Administrative Law Judge Norman Zankel issued the attached decision. The General Counsel, the Charging Party, and the Respondent filed exceptions and supporting briefs. The Charging Party and the Respondent filed answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions only to the extent consistent with this Decision and Order.

1. The judge found that a contract proposal made by the Respondent during negotiations with the Union concerned a mandatory subject of bargaining and that the Respondent did not violate Section 8(a)(5) of the Act by insisting to impasse on its inclusion in the parties' contract. We do not agree with this conclusion, for we find that the contract proposal was a nonmandatory subject of bargaining.

The Respondent provides mental health services to the residents of Hamilton County, Ohio. The Hamilton County Mental Health Board (County Board) provides the Respondent with the majority of its operating funds, which are derived from a special real estate tax levy on the county's residents. The County Board is to consider the next special levy in 1990.

The Union was certified in May 1987 as the collective-bargaining representative of the Respondent's employees in separate units of clerical employees and professional/nonprofessional employees. The parties began negotiations for a contract in July 1987 and engaged in approximately 12 bargaining sessions through May 1988 without reaching agreement.

In December 1987, after approximately six bargaining sessions, Robert Callahan, the Union's spokesman during negotiations, appeared before the County Board to remind the Board that although the Union had supported the special tax levies in the past, its support of the 1990 tax levy could be jeopardized if the Respondent failed to bargain in good faith.

At the February 13, 1988[2] bargaining session, the parties discussed, inter alia, a portion of the Respondent's proposed management-rights clause which requested the Union ''to cooperate fully with employer in the exercise of these management rights.'' This proposal was not new and the Union had previously opposed it because the Union could not guarantee its implementation. The Union requested the Respondent to explain what was required of the Union pursuant to this clause.

On February 20, the Respondent presented a new management-rights clause entitled ''Responsibility of the Parties,'' part of which is as follows:

> The Union recognizes that the Union and all employees have an obligation to insure the highest degree of responsibility and service of clients and others utilizing the . . . (Employer's) . . . premises and services. The Union recognizes that neither it nor the employees will before, during or after the term of this Agreement interfere with the ability of the Employer to provide services by any attempt to restrain, coerce, or otherwise influence any actual or potential funding source for the . . . (Employer) . . . or any actual or potential client. It is also recognized that conducting Union or personal business during working hours may interfere with effective operations of the . . . (Employer) . . . and will not be permitted.

Callahan protested that the Respondent's proposal, which prohibited the Union from opposing the Respondent's funding, was a nonmandatory bargaining subject and restricted its members' exercise of their political rights.

The Respondent explained that this proposal grew out of its concern over Callahan's December 1987 appearance before the County Board suggesting the Union might withdraw its support for the 1990 mental health tax levy. The Respondent emphasized that it needed protection ''against the threat of the Union engaging in any political campaigning against the levy which was the major source of the [Respondent's] funding.'' Callahan suggested that the Union might agree to a provision committing the Union to campaign for the tax levy if the Respondent would propose a fair contract.

The parties exchanged a number of contract proposals at the February 29 negotiating session. The Respondent proposed another revision to its management-rights clause,[3] and the Union countered with its affirmative commitment language. Callahan summarized the

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] All subsequent dates are in 1988 unless otherwise indicated.

[3] The revision pertained to the period of time during which the Respondent requested that the Union refrain from political activity.

Union's position on disputed issues and reaffirmed the Union's view that it would not sign a contract which ''restricted the political rights of [Union] members'' and that the Respondent did not have the right to bargain to impasse over this issue. The Respondent concluded the February 29 meeting by stating that the Union's contract proposals made that date were unacceptable.

The Union then initiated a publicity campaign to gain support for its bargaining position. Callahan asked the County Board to intervene in its dispute with the Respondent.

The parties met again on May 16, at which time the Union presented its final contract proposal, agreeing to all parts of the Respondent's ''Responsibility of the Parties'' proposal except for the language pertaining to influencing the Respondent's funding source. The parties disagreed as to whether the disputed language was a mandatory or nonmandatory bargaining subject. The Respondent remained firm in its position that the contract contain a prohibition against political activity, particularly in light of the Union's publicity campaign and its appearance before the County Board.

By letter dated May 26, the Respondent reiterated that the proposal prohibiting attempts to influence funding sources was a mandatory subject. The Union's June 13 letter reaffirmed its view that the proposal was nonmandatory. On June 14, based on a petition signed by employees from both units and on subsequent conversations with several supervisors who indicated that a majority of the staff was unhappy with the Union and wanted it to be removed, the Respondent withdrew recognition from the Union in both units. No negotiations have occurred since May 16.

At issue is whether the Respondent breached its bargaining obligation when it insisted to the point of impasse that the Union agree to language prohibiting the Union and employees from interfering with the Respondent's ability to obtain funding. ''The mutual obligation of employers and unions to bargain in good faith as defined in Section 8(d) of the Act includes the requirement that they 'confer in good faith with respect to wages, hours, and other terms and conditions of employment.'''[4] Parties to collective-bargaining negotiations may bargain to impasse over provisions relating to wages, hours, and other terms and conditions of employment (i.e., a mandatory subject of bargaining), but it is unlawful to insist on including in a contract a provision which does not relate to these matters (i.e., a permissive subject of bargaining). See *NLRB v. Borg-Warner Corp*., 356 U.S. 342, 349 (1958).

We determine the mandatory/permissive character of a contract proposal by deciding if it is one which will ''settle an aspect of the relationship between the employer and employees.''[5] As the First Circuit has stated, ''[T]his means that the subject must bear a 'direct, significant relationship to . . . terms or conditions of employment,' rather than a 'remote or incidental relationship.'''[6]

In this case, the Respondent seeks to prevent the Union and employees from interfering with the Respondent's ability to provide services to its clients by engaging in activities which might affect the availability of the revenues it requires to continue its operations. The proposal's prohibition against any attempt to influence the Respondent's funding sources seeks to govern employee activities which might occur *outside* the workplace and *outside* the employment relationship. Furthermore, the Respondent seeks, by its insistence on this issue, to determine the Union's position on a political issue. Neither objective is directly related to the employees' terms and conditions of employment. It is our view that the disputed provision does not fall within the purview of the phrase ''wages, hours, and other terms and conditions of employment'' and that it is *not* a mandatory subject of bargaining.[7]

[4] *Sheet Metal Workers Local 38 (Elmsford Metal Works)*, 231 NLRB 699, 700 (1977).

[5] *Allied Chemical Workers Local 1 v. Pittsburgh Plate Glass Co*., 404 U.S. 157, 178 (1971).

[6] *NLRB v. Salvation Army Day Care Center*, 763 F.2d 1, 7 (1st Cir. 1985), quoting *NLRB v. Massachusetts Nurses Assn*., 557 F.2d 894, 898 (1st Cir. 1977).

[7] The Respondent argues that the disputed provision is similar to a no-strike clause and that it is, thus, a mandatory subject of bargaining. The Respondent contends that the disputed provision relates to its ability to continue its operations and that it needed the protection offered by the provision in light of the Union's threat to interfere with the Respondent's funding, for, without the funding, the Respondent would go out of business. We do not accept this analogy. A no-strike clause is a mandatory subject of bargaining because it regulates what the employees can and cannot do *at the workplace* and thus directly relates to matters within the employment relationship, i.e., ''regulates the relations between the employer and the employees.'' *Borg-Warner*, supra at 350. The Respondent's proposed contract language, to the contrary, seeks to regulate *nonwork* activities, and seeks to regulate employee and union relations with entities other than the Respondent.

The judge found that the effects of the Union's success in preventing the Respondent from obtaining its funding would be similar to the effects of a successful strike by a union, i.e., the inability of the Respondent to carry on its operations. However, the potential results of a particular union action do not determine whether a contract proposal prohibiting that action is mandatory or permissive. See the discussion of the relevant law in the text, supra. Nor is it determinative that the Respondent was seeking, in the words of the judge, ''to avert financial disaster.'' As the Fourth Circuit has stated:

> Not all proposals that somehow respond to a problem that is customarily bargained about may themselves be insisted upon to impasse. Some proposals in response to the problem of strikes are mandatory subjects of bargaining. In *Borg-Warner*, however, the Supreme Court held that the ''ballot'' clause was not. Some proposals to reduce disruptions resulting from breaches of contract are mandatory subjects of collective bargaining, e.g., arbitration agreements. Yet . . . it has been consistently held that performance bonds are not mandatory subjects. *It is the particular proposal, not merely the problem to which it is addressed, that must concern ''wages, hours, and other terms and conditions of employment.''* *NLRB v. Arlington Asphalt Co*., 318 F.2d 550, 557 (4th Cir. 1963) (emphasis added).

Finally, we note that in his decision the judge cited *Ford Motor Co. v. NLRB*, 441 U.S. 488 (1979), and found, inter alia, that the Respondent's proposal satisfied the *Ford Motor* criterion of relevance to the working environment. However, as set forth above, we find, contrary to the judge, that the Respondent's provision seeks to regulate nonwork activities and is therefore not germane to the working environment. Accordingly, we conclude that *Ford Motor* does not support the judge's decision.

2. We further find, in agreement with the judge,[8] that the parties were adamant in their respective positions about the disputed portion of the ''Responsibility of the Parties'' clause and this adamant insistence was a part of the reason a contract was not reached after May 26. In response to the Union's request for clarification of the Respondent's February 13 management-rights proposal, the Respondent proposed, on February 22, its ''Responsibility of the Parties'' clause, by which the Union was to agree not to interfere with the Respondent's ability to obtain funding. The Union protested that this language restricted its members' political rights and that the subject matter of the clause was a nonmandatory subject of bargaining. The Respondent in turn emphasized that it needed the protection offered by this language in light of the Union's December 1987 appearance before the County Board. On February 29, the Respondent made a nonsubstantive change to the disputed clause. The Union suggested that it might agree to campaign for the special tax levy if the Respondent would propose a fair contract, but reasserted that it would not sign a contract containing the disputed language. When the parties met again on May 16, the Union presented its ''final'' contract proposal omitting the disputed language of the Respondent's ''Responsibility of the Parties'' proposal. The parties disagreed as to the mandatory/nonmandatory nature of the Respondent's proposal. The Respondent, however, remained adamant that the contract contain the disputed language.

The Respondent's May 26 letter reiterated its position that the subject matter of the disputed clause was a mandatory bargaining subject and that the inclusion of the disputed clause in a contract was the Respondent's ''first priority.'' The Respondent indicated that it would review whatever subsidiary issues still remained in dispute at that time if the Union would accept the Respondent's previously expressed position on several issues, chief among them the noninterference clause. The Union's June 13 letter referred to the Respondent's noninterference clause as ''ridiculous'' and urged the Respondent to withdraw the proposal. No direct response to the Union's June 13 letter was ever received by the Union and no negotiations have been held since May 26. On June 14, the Respondent withdrew recognition from the Union.

The judge found that the parties maintained rigid positions regarding the disputed clause. Although the Respondent maintains that its modifications to the clause showed some movement on this issue, a closer examination of the changes shows that they merely dealt with the timeframe in which the disputed clause was to apply. They were not intended to relieve the Union of the responsibility which the Respondent wanted it to assume. Indeed, by proposing merely minor changes, the Respondent made it clear that it intended to force the inclusion of its desired language in the contract. Additionally, the Respondent's claim that it would review subsidiary issues *if* the Union would agree to the disputed language makes its all the more obvious that the Respondent was insisting that the disputed proposal be kept in the contract.

The Union also remained firm in its position that the disputed language would *not* be included in any contract it signed with the Respondent. The Union continually maintained that the subject matter of the proposal was a nonmandatory subject of bargaining. The Union's proposal that it would actively support a special tax levy in return for a fair contract did not constitute a change in its position rejecting the entire disputed clause. Moreover, Callahan's appearance before the County Board to secure the Board's assistance in its contract negotiations indicates how strongly the Union believed in its position on this issue.

We find that the Respondent insisted on including the nonmandatory provision despite the Union's continued rejection of the proposal and that the nonmandatory proposal was one of the subjects preventing agreement on a contract. It is well settled that a party may not insist to the point of impasse on accepting a proposal on a nonmandatory subject as a condition for reaching a collective-bargaining agreement. Accordingly, we find that the Respondent violated Section 8(a)(5).[9]

3. We further conclude that the Respondent violated Section 8(a)(5) by withdrawing recognition from the Union as the collective-bargaining representative of employees in both the clerical unit and the professional/nonprofessional unit, for the Respondent's withdrawal of recognition did not occur in a context free of unfair labor practices.

In late winter/early spring, employee Gausmann told O'Bryan, the Respondent's executive director, that he and other employees were unhappy with the Union and asked if there was anything they could do to eliminate the Union. O'Bryan responded that nothing could be done until the Union's certification year had expired. In late May, Gausmann learned from O'Bryan that the certification year had ended and told O'Bryan that he was going to circulate a petition among the employees.

On June 2, Gausmann gave O'Bryan a petition containing the signatures of 23 bargaining unit employees stating that they no longer wished to be represented by the Union. Of the 23 signatures on the petition, 19 were from employees in the professional/nonprofessional unit and 4 were from the clerical unit. On June 3, Gausmann orally gave O'Bryan the names of five

[8] The judge decided to reach and decide the impasse issue in the event that his decision on the mandatory/nonmandatory nature of the disputed contract provision was reversed.

[9] See *Borg-Warner*, supra at 349; *Laredo Packing Co.*, 254 NLRB 1, 18–19 (1981).

additional employees who were opposed to the Union. Three of 12 supervisors told O'Bryan that a majority of the staff was unhappy with the Union and wanted it removed. On June 14, the Respondent withdrew recognition from the Union as the representative of employees in both bargaining units.

The Respondent claims, based on the above facts, that it had a good-faith doubt as to the Union's majority status. The judge found that the Respondent's claim was valid as to the clerical unit because all four unit employees had signed the petition. As to the professional/nonprofessional unit, however, the judge found the employee petition was insufficient to establish a good-faith doubt because it was signed by only 19 of 44 employees, less than a majority of unit employees.

Unlike the judge, we find that the Respondent was not privileged to withdraw recognition from the Union in either unit of employees it represented, for Respondent's withdrawal of recognition did not occur in a context free of unfair labor practices. An employer may withdraw recognition from an incumbent union under certain circumstances.[10] However, a withdrawal of recognition must occur in a context free of unfair labor practices which are of ''such a character as to either affect the [u]nion's status, cause employee disaffection, or improperly affect the bargaining relationship itself.''[11] The Respondent's insistence on the inclusion of a permissive subject of bargaining as a condition for a collective-bargaining contract is the type of violation ''which would improperly affect the bargaining relationship so as to negate the legality of the later withdrawal of recognition.''[12] Accordingly, we find that the Respondent violated the Act when it withdrew recognition from the Union in both units.[13]

CONCLUSIONS OF LAW

1. The Respondent's proposal that the Union agree that neither it nor the bargaining unit employees would attempt to restrain, coerce, or otherwise influence any actual or potential funding source for the Respondent or any actual or potential client is a nonmandatory subject of bargaining.

2. The Respondent violated Section 8(a)(5) and (1) of the Act by demanding, as a condition of reaching a collective-bargaining agreement, that the Union agree to a contractual provision in a proposed management-rights clause that prohibited the Union or employees from any attempts to restrain, coerce, or otherwise influence any actual or potential funding source for the Respondent or any actual or potential client.

3. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the collective-bargaining representative of its employees in the professional/nonprofessional unit.

4. The Respondent violated Section 8(a)(5) and (1) of the Act by withdrawing recognition from the Union as the collective-bargaining representative of its employees in the clerical unit.

5. The unfair labor practices found above are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

AMENDED REMEDY

In addition to the remedy recommended by the judge, we shall order that the Respondent cease and desist from withdrawing recognition from, and refusing to bargain with, the Union as the exclusive bargaining representative of the employees in the clerical unit. We shall further order the Respondent to recognize and bargain with the Union, on request, as the representative of the employees in the clerical unit.

ORDER

The National Labor Relations Board orders that the Respondent, Mental Health Services, Northwest, Inc., Cincinnati, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Refusing to bargain collectively with District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL–CIO, by demanding, as a condition of reaching a collective-bargaining agreement, that the Union agree to a contractual provision in a proposed management-rights clause that prohibits the Union or employees from any attempts to restrain, coerce, or otherwise influence any actual or potential funding source for the Respondent or any actual or potential client.

(b) Withdrawing recognition from, and refusing to bargain collectively with, the above-named Union as the exclusive bargaining representative of employees in the following appropriate unit:

> All full-time and regular part-time professional and nonprofessional employees employed at the Respondent's mental health facilities at locations in and around Cincinnati, Ohio, excluding office clerical employees, management employees, guards and supervisors as defined in the Act.

(c) Withdrawing recognition from, and refusing to bargain collectively with, the above-named Union as the exclusive bargaining representative of employees in the following appropriate unit:

> All office clerical employees, excluding all confidential employees, supervisory employees,

[10] *Guerdon Industries*, 218 NLRB 658, 659 (1975), and cases cited there.

[11] Id. at 661.

[12] Ibid.

[13] Because our finding of a violation is based on the context in which the withdrawal of recognition occurred, we find it unnecessary to pass on the issues raised by the employee petition presented to the Respondent.

guards and all other employees, professional and nonprofessional.

(d) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Recognize and, on request, bargain collectively and in good faith with the above-named Union, as the exclusive bargaining representative of the employees in the aforementioned appropriate bargaining units, concerning the wages, hours, and other terms and conditions of employment of those employees and, if an understanding is reached, embody that understanding in a signed contract.

(b) Post at its Cincinnati, Ohio facilities copies of the attached notice marked ''Appendix.''[14] Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(c) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

CHAIRMAN STEPHENS, concurring.

I agree with my colleagues, for the reasons stated in their opinion, that the Respondent's withdrawal of recognition violated Section 8(a)(5) and (1) of the Act and that the parties had bargained to impasse over the ''Responsibility of the Parties'' clause. I write separately only to make clear the limited ground on which I concur in the finding that the Respondent violated Section 8(a)(5) and (1) of the Act by insisting to impasse on that clause, which prohibited the Union or the unit employees from threatening the Respondent's financial resources by taking any actions ''to restrain, coerce, or otherwise influence any actual or potential funding source . . . .'' I find the clause a merely permissive subject of bargaining only because of the breadth of the prohibition.

In my view, some of the kinds of activity covered by this proposal could be related to workplace interests and could therefore constitute protected activity which the Union might waive participating in, just as it can waive the right to strike. Cf. *Sacramento Union v. NLRB*, 889 F.2d 210 (9th Cir. 1989) (holding that employee letters to employer-newspaper's advertisers criticizing the employer were protected by Sec. 7 because they related to terms and conditions of employment).

I find it unnecessary, however, in order to decide this case, to decide whether a clause embodying such a waiver would be a merely permissive subject of bargaining. This is so because the clause proposed by the Respondent embraced *any* actions influencing funding sources that could interfere with the Respondent's revenues, i.e., there was no limit on the reasons for such actions or the form such actions might take. Even in the Respondent's May 26 letter referring to ''subsidiary language issues'' the Respondent still made it clear that it wanted a contractual prohibition that would assure against any cutting off of its funding. I therefore agree that the prohibition ventured beyond the employer-employee relationship, and for that reason the Respondent's insistence to impasse violated Section 8(a)(5) and (1).[1]

[14] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

[1] I see a parity of reasoning here with that of Justice Stewart in his concurrence in *Fibreboard Corp. v. NLRB*, 379 U.S. 203 (1964). He found it ''hardly conceivable that [management] decisions,'' such as the employer's ''manner of financing'' are so related to '''conditions of employment' that they must be negotiated with the employees' bargaining representative.'' Id. at 223. Thus, a union clearly could not insist to impasse on a proposal governing an employer's sources of financing. By the same token, we are finding here that an employer may not insist to impasse on a clause broadly prohibiting the union from expressing its opinion on funding to the sources of the Respondent's ''financing arrangements.''

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize

To form, join, or assist any union

To bargain collectively through representatives of their own choice

To act together for other mutual aid or protection

To choose not to engage in any of these protected concerted activities.

WE WILL NOT refuse to bargain collectively with District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL–CIO, as the exclusive collective-bargaining representative of the employees in the below-named appropriate units, by demanding, as a condition of reaching a collective-bargaining agreement, that the Union agree to a contractual provi-

sion in a proposed management-rights clause that prohibits the Union or employees from any attempts to restrain, coerce, or otherwise influence any actual or potential funding source for the Employer or any actual or potential client.

WE WILL NOT withdraw recognition from, or refuse to bargain with, the above-named Union, as the exclusive collective-bargaining representative of employees in the following appropriate units:

> All full-time and regular part-time professional and nonprofessional employees employed at our mental health facilities at locations in and around Cincinnati, Ohio, excluding office clerical employees, management employees, guards and supervisors as defined in the Act.
>
> All office clerical employees, excluding all confidential employees, supervisory employees, guards and all other employees, professional and nonprofessional.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize and, on request, bargain collectively and in good faith with the above-named Union as the exclusive representative of all the employees in the appropriate units described above with regard to wages, hours, and other terms and conditions of employment and, if an understanding is reached, embody that understanding in a signed agreement.

MENTAL HEALTH SERVICES, NORTHWEST, INC.

Carol L. Shore, Esq., for the General Counsel.
Timothy P. Reilly, Esq. (Taft, Stettinius & Hollister), of Cincinnati, Ohio, for the Employer.
Mr. Robert J. Callahan, Secretary-Treasurer, of Columbus, Ohio, for the Union.

DECISION

NORMAN ZANKEL, Administrative Law Judge. This case was tried before me on January 24–25, 1989, at Cincinnati, Ohio.

The Union filed the charge on July 14, 1988.[1] The Regional Director for Region 9 of the National Labor Relations Board (the Board) issued a complaint against the Employer on October 24.

The complaint alleges the Employer unlawfully refused to bargain collectively with the Union, in violation of Section 8(a)(5) and (1) of the National Labor Relations Act (the Act), in two respects: (1) by insisting, to the point of impasse, the Union agree to the inclusion in a collective-bargaining agreement of a nonmandatory subject of bargaining; and (2) by improperly withdrawing recognition from the Union as the certified exclusive collective-bargaining agent of certain of its employees.

[1] All dates are in 1988 unless otherwise indicated.

The Employer filed a timely answer to the complaint. The answer admits certain allegations, but denies the Employer committed either of the alleged unfair labor practices.

All parties were given full opportunity to produce relevant evidence through witnesses and documents; to examine and cross-examine witnesses; and to make oral arguments. Posthearing briefs were received from counsel for the General Counsel and the Employer.[2] Based on my observation of the conduct and demeanor of the witnesses, and the record as a whole, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

Jurisdiction is uncontested. The Employer is a nonprofit corporation engaged in providing out-patient and professional care services as a health care institution operating mental health care facilities in Cincinnati, Ohio.

In the 12-month period immediately preceding complaint issuance, the Employer's gross revenues exceeded $1 million from these operations; and, in the same time period, the Employer purchased and received products, goods, and materials exceeding $50,000 in value at its Cincinnati, Ohio facilities. Such products, goods, and materials came from other enterprises in Ohio, each of which, in turn, received them directly from points outside Ohio.

The Employer admits, the record reflects, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7), and a health care institution within the meaning of Section 2(14) of the Act.

All parties agree, the record reflects, and I find the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. THE ISSUES

A. Did the Employer insist, to point of impasse, upon the Union's agreement to a nonmandatory bargaining subject?

B. Did the Employer unlawfully withdraw recognition from the Union as exclusive collective-bargaining representative of certain of its employees?

I shall find the disputed provision is a mandatory bargaining subject; an impasse in bargaining existed; the withdrawal of recognition relative to the clerical unit was lawful; but the withdrawal of recognition regarding the professional[3] unit constituted an unlawful refusal to bargain.

III. THE ALLEGED UNFAIR LABOR PRACTICES[4]

A. *Background*

The Employer has provided outpatient counseling, residential, and day treatment mental health services since 1973.

[2] The Employer's unopposed posthearing motion to correct transcript is granted.

[3] The certification actually encompassed ''professional and nonprofessional'' personnel. For convenience, this unit will be referred to as the ''professional unit.''

[4] The operative facts are substantially undisputed. My description of facts in this, sec. III, of the decision, is a composite of contents of documentary evidence (many of which were offered and received as joint exhibits), undisputed testimony, and stipulations. Not all evidence, or argument based on it, is reported. Omitted matter is deemed irrelevant, superfluous or of no probative value.

These services have been, and are, provided principally to residents of Hamilton County, Ohio. The Hamilton County Community Mental Health Board (County Board), supplies the Employer with the bulk of its operating funds. Eighty to 85 percent of such funds are supplied by the County Board under a performance contract between it and the Employer.

The County Board's funds are derived from a special real estate tax levy. Such a levy first was passed by the County Board in 1980 for a 5-year period; was renewed for another 5 years in 1985; and will next appear on the ballot in 1990. The levy generates $10 to 15 million annually. This levy constitutes the local revenue source required to match mental health funds provided by the Federal and state governments to the County Board for use in Hamilton County.

On May 21, 1987, the Union was certified as the exclusive collective-bargaining representative of two separate units of the Employer's employees. One unit consists of ''all full-time and regular part-time professional and non-professional employees . . . excluding office clerical employees, management employees, guards and supervisors as defined in the Act.''

The second bargaining unit is composed of ''all office clerical employees, excluding all confidential employees, supervisory employees, guards and all other employees, professional and non-professional.'' All parties agree these units are appropriate for collective bargaining within the meaning of the Act.

The parties began collective-bargaining negotiations in July, 1987. Robert Callahan, the Union's secretary-treasurer, was the Union's chief spokesperson throughout the negotiating sessions which were conducted on various dates through May 16, 1988. The Employer's chief spokesperson was Attorney Barbara Donley from the beginning of negotiations until January 22, 1988. On that date, Donley telephoned Callahan and advised him that the Employer would thereafter be represented by Attorney William K. Engeman.

In December 1987 Callahan appeared before the County Board. He reminded that Board that the Union had supported the county mental health service levies in the past, but that such political support could be jeopardized by the failure of the Employer to bargain in good faith.

The parties held approximately 12 bargaining sessions in 1987, but no agreement upon contractual terms had been reached. A bargaining session had been scheduled for January 25, but was canceled because of inclement weather. That meeting was rescheduled for February 1.

B. *The Bargaining Proposal*

1. The facts

In 1988, the parties met together five times for negotiations between February 1 and May 16, as follows:

February 1: The Union presented a written proposal (Jt. Exhs. 1–16) for economic terms. The proposal was for wages, health, vacation, holiday, sick leave, and continuing education benefits. The Union's proposal contained a contract expiration date of July 1, 1990.

Engeman rejected the economic proposal as being inconsistent with the Employer's bargaining positions previously taken by his negotiating predecessor.

Callahan reviewed the status of negotiations to that date. Callahan asked Engeman to present a complete written proposal from the Employer. Callahan agreed to do so.

The parties agreed to change their meeting format from Monday evening to daytime hours. They arranged the next bargaining session for Saturday afternoon, February 13.

February 13: Engeman presented a document which contained the Employer's proposed language for noneconomic terms of a collective-bargaining agreement (see Jt. Exh. 2). Those proposals included provisions upon which the parties previously agreed. Discussion ensued, during which the parties identified specific areas of disagreement and presented their views regarding them.

No new agreements were reached on any language during this bargaining session. However, considerable discussion was held concerning the Employer's inclusion of the following sentence in its proposed management-rights clause:

> The Union undertakes for itself, its representatives, agents and members to cooperate fully with employer in the exercise of these management rights.

The quoted sentence had been included in earlier employer proposals. Callahan said he had already opposed inclusion of that language because he could not guarantee its implementation. Callahan asked Engeman to explain exactly what it was that the Employer wanted the Union to do to demonstrate the cooperation called for by this aspect of the Employer's proposal.

Apparently, Engeman did not explicitly respond during this meeting. Instead, Engeman testified that Callahan's question

> sort of laid the redicate [sic] for the proposal we [the Employer] put on the table on . . . (February 22) . . . which was a revision of . . . [the management-rights proposal and] . . . the subject of . . . [the instant] . . . proceeding'' (Tr. vol. II, p. 11).

The parties agreed to meet again on February 22.

February 22: This session opened with the Employer's delivery of (a) an alternative economic proposal (Jt. Exh. 3); (b) revised dues-checkoff and no-strike/lockout clauses (Jt. Exh. 14); and (c) another management-rights proposal under the new title ''Responsibility of the Parties'' (Jt. Exh. 16).

The Employer's executive director, John O'Bryan, made a detailed presentation of the alternative economic proposal which contained a new concept calling for the establishment of a joint management/staff subcommittee to study to economic issues and report economic recommendations to the Employer's and Union's bargaining committees. The Union rejected the concept of the separate subcommittee and asked the Employer to present an explicit offer on compensation and other economic benefits.

The Employer's revised management-rights proposal engendered considerable discussion. As indicated above, formerly, that provision had been entitled ''Management Rights'' (see Jt. Exh. 2, p. 6). Because Callahan had asked Engeman to explain what the Employer required by way of its proposal (see February 13 meeting, above), which required the Union to agree to cooperate in implementation of management rights, Engeman changed the title of the management-rights proposal to ''Responsibility of the Parties.''

Other changes were made in the Employer's management-rights clause. Specifically, the disputed language which required union cooperation had been deleted. A new proposed paragraph was substituted. The new proposal reads:

> The Union recognizes that the Union and all employees have an obligation to insure the highest degree of responsibility and service for clients and others utilizing the . . . [Employer's] . . . premises and services. The Union recognizes that neither it nor the employees will before, during or after the term of this Agreement interfere with the ability of the Employer to provide services by any attempt to restrain, coerce, or otherwise influence any actual or potential funding source for the . . . [Employer] . . . or any actual or potential client. It is also recognized that conducting Union or personal business during working hours may interfere with effective operations of the . . . [Employer] . . . and will not be permitted.

Callahan protested, in relevant part, that the new language which prohibited the Union from opposing the Employer's funding was a nonmandatory bargaining subject. He also said the Union had no intention of agreeing to contract language which would limit the political rights of the Union and the employees.

Engeman explained why the Employer was proposing limitations on union opposition to funding the Employer's operations. He said this proposal grew out of Callahan's December 1987 appearance (reported above), before the County Board at which he suggested to that Board the Union might alter its previous position in support of mental health tax levies.

Engeman further explained the disputed proposal emanated from the Employer's concerns over repeated union references during the parties' negotiations that if a fair and reasonable settlement were not reached between the parties the Union would seek assistance of other labor organizations to organize opposition to the next (1990) mental health levy. As Callahan candidly testified, ''Mr. Engeman made it very clear that they wanted to have protection in this contract against the threat of the Union engaging in any political campaigning against the levy which was the major source of the . . . [Employer's] . . . funding'' (Tr. vol. I, p. 31).

Callahan said it was in the Union's best interest to support the mental health tax levies because they were obvious sources of its members' wages and benefits. Callahan proposed the parties adopt a contractual provision similar to one he negotiated with an employer in Toledo, Ohio. He explained that provision committed the Union to campaign affirmatively for a levy, and said he would be willing to agree to do the same for the instant Employer but only if the Employer would propose a fair contract. Engeman agreed to examine language incorporating Callahan's suggestion. That language was not available on February 22.

The parties reached no agreements during this bargaining session. They arranged to meet again on February 29.

February 29: O'Bryan discussed the Employer's budget, including its projections of 1989 revenues and expenses. This information was contained in documents (Jt. Exhs. 4a–4b), delivered to the Union at this bargaining session.

The parties exchanged certain proposals. The Employer delivered revised no-strike/lockout and dues-checkoff clauses (Jt. Exh. 5), an insurance proposal (Jt. Exh. 6), and another revised version of the management-rights clause (Jt. Exhs. 15a–15b). The Union delivered the language of its affirmative commitment to supporting mental health levies (G.C. Exh. 2), as a counterproposal to the disputed language of the Employer's management-rights proposal.

The parties discussed compensatory time off, sick leave, and insurance. No agreements were reached. They then discussed the Responsibility of the Parties (management rights) proposal. As noted above, the provision delivered at this meeting constituted a revision of the Employer's language submitted to the Union on February 22.

Engeman discussed the revisions. He told the union representatives that the Employer dropped the language which restricted the Union from attempting to interfere with funding before and after the term of the collective-bargaining agreement being negotiated. Engeman said the language of the revised proposal required the Union to refrain from such activity only during the term of the collective-bargaining agreement.

In fact, on February 22, the disputed language read, ''The Union recognizes that neither it nor the employees will *before, during or after* the term of this Agreement interfere (etc.).'' (Emphasis added.) The disputed language, on February 29, reads, ''The Union recognizes that neither it nor the employees will interfere (etc.).'' Thus, Engeman's explanation of the meaning of the February 29 revision was predicated on the absence of any explicit reference to a timeframe.

Callahan rejected the disputed language presented on February 29. He repeated his belief the Employer's proposal was a restriction on the political rights of the Union and employees. He again told Engeman the Employer's proposal was a nonmandatory bargaining subject. Engeman retorted he believed the disputed matter was a mandatory subject and repeated the Employer needed such protection because of the Union's past conduct in its dealings with the County Board.

Callahan again proposed adoption of the Union's language committing itself to levy support, but that the Union's proposal required it to receive a ''fair settlement of all the other issues.'' In fact, the document which contains the Union's proposed language also contains the notation: ''This proposal is contingent upon acceptance of the Union's position on all outstanding issues'' (G.C. Exh. 2).

The discussion turned to economic items, but no agreements were reached. The parties caucused. A mediator attended the union caucus. He was asked to tell the Employer's representatives that the Union was willing to revise its union-security proposal from one seeking a union shop to one for agency shop. The mediator apparently conveyed this information. He returned to tell the union negotiators that the Employer rejected any provision which would compel employees to pay union dues.

The parties then reconvened in joint session. The Union proposed an agency shop, establishment of a labor-management committee, and wage increases with no reduction of fringe benefits.

Callahan and Engeman gave different testimonial versions of what, if anything, then was said concerning the management-rights proposal. Engeman testified that Callahan ''made

a proposal *which the minutes reflect* . . . (but) . . . said nothing about section four'' [of the Employer's Responsibility of Parties proposal. (Tr. vol. II, p. 23, emphasis added).

Callahan testified ''We . . . made it clear . . . [to the Employer] . . . that absolutely there had to be a contract that did not include the political prohibition. They did not have the right to bargain to impasse over that. We were not going to sign a contract, and it was unreasonable to even think that we would, that in any way restricted the political rights of our members'' (Tr. vol. I, p. 42).

I adopt Callahan's version concerning what was finally said about the disputed proposal on February 29, although I found Engeman and Callahan generally equally credible and reliable witnesses. There are four bases for adoption of Callahan's description. First, I find it probable the Union would have repeated its opposition to the Employer's proposal because of the frequent and adamant earlier expressions of concern that the Employer could not require the Union and employees to relinquish rights to engage in political activity.

Second, I find it likely Callahan's remarks would have been made at the conclusion of the February 29 session when he was summarizing the Union's current position on disputed issues, especially because the words he claims to have uttered are fully consistent with the Union's proposal to agree to the provision by which the Union pledged its support of levies.

Third, I find Callahan's recital of the relevant discussion more reliable because it was rendered spontaneously directly from his personal recollection. In contrast, the emphasized portion of Engeman's testimony (above) tends to support a conclusion that Engeman's recall of these particular remarks is, in part, based on notes which are not necessarily complete descriptions of what took place.

Finally, in testimony not previously reported, Engeman acknowledged that Callahan ''was saying that the Union would sign a contract that included Section Four as he (Callahan) had drafted it . . . .'' Engeman further testified Callahan asserted the disputed proposal was a nonmandatory bargaining subject; Engeman disagreed and suggested each of them research the authorities on that point (Tr. vol. II, pp. 24–25). I find this combination of Engeman's testimony an impressive indicator that the discussion about the disputed language occurred as Callahan described it.

The meeting ended with Engeman telling Callahan that the Union's proposals were unacceptable and were not going to be the basis for an agreement. The February 29 session adjourned with agreement that if either party's position were to change, the mediator would be notified and another bargaining session could be arranged.

The Union immediately initiated a publicity campaign to gain support for its bargaining objectives. By letter dated March 1, Union President Henry Nicholas notified O'Bryan that the Union intended to conduct informational picketing at the Employer's location on March 16. On March 16, employees distributed handbills at the Employer's headquarters.

On March 17, Callahan attended the regularly scheduled monthly County Board meeting. (He had previously requested an opportunity to address the County Board on this date and was provided 5 minutes to make his presentation, see R. Exh. 2). He asked those board members to intervene in resolving the Union's dispute with the Employer. He made it clear the Union was opposed to use of tax money for ''union busting'' and threatened if employers funded by the county levy engaged in such tactics, the Union would oppose the next levy.

Callahan also wrote a letter dated March 28 to the Cincinnati AFL–CIO, and a letter dated March 29 to individual union members. In relevant part, he solicited their support to notify the County Board that they would oppose the next levy unless the board intervened to help produce a fair collective-bargaining agreement.

A second notice of intent to picket was sent to the Employer by letter dated March 21, advising picketing would take place on April 6. Callahan testified no picketing actually occurred because of inclement weather.

At Callahan's request in late April, the mediator arranged for the parties to meet on May 16. The meeting was conducted at the Union's office. Callahan announced he was prepared to spend an indefinite amount of time negotiating that day. Engeman said O'Bryan's time was limited and it wasn't Engeman's understanding the parties would be spending unlimited time together that day. In any event, the following material discussion took place.

May 16: Engeman criticized the Union for having publicly claimed that tax levy funds were supporting union-busting tactics. He said the Union's actions since their February 29 meeting caused him to propose any collective-bargaining agreement negotiated by these parties would expire after the date of the 1990 tax levy. Engeman accused Callahan of being prepared to ''take down mental health services for the entire community in some fight he was having with [the instant Employer].'' Engeman told Callahan if there was a way he [Engeman] could stop the Union from such disruption, he was going to stop it.

Callahan asked for a final proposal on economics. Engeman said he was not prepared to make proposals; that the meeting had been convened at the Union's request; and the Employer was prepared to listen to any proposals the Union might offer.

Callahan presented what he termed the Union's ''final'' proposal (G.C. Exh. 3). In relevant part, the Union proposed the parties agree to all of the Employer's Responsibility of Parties proposal, except section four which contained the disputed language. Callahan again asserted he believed that part of the Employer's proposal was a nonmandatory bargaining subject. Engeman asked Callahan to show him legal authority holding this issue nonmandatory. Engeman said he had not researched the issue, but thought the Employer's proposal was a mandatory bargaining subject.

Engeman said the Employer was firm in its position that the collective-bargaining agreement contain a prohibition against political activity and the Employer's commitment to that position became stronger because of the tenor of the Union's publicity campaign and Callahan's attendance, and discussion, at the County Board's March meeting.

Callahan proposed a contract termination date of June 30, 1990. Engeman said the Employer was somewhat flexible regarding an exact expiration date, but nonetheless was adamant that the contract's term would have to extend beyond the date of the 1990 mental health levy.

The May 16 meeting ended with Engeman saying he would submit a written response to the remainder of the Union's ''final'' proposal.

In fact, Engeman did respond to the Union's proposal by letter dated May 26 (Jt. Exh. 10). In that letter, Engeman once again stated his view that the Employer's proposal prohibiting the Union from attempting to influence funding sources is a mandatory bargaining subject. Engeman wrote he would review legal authorities supporting the Union's opposite position if the Union would provide them.

Meanwhile, Engeman suggested Callahan ''review the authorities which we believe support the general proposition that an attack on an ordinary business' customers or suppliers, even by protected concerted activity, such as strikes or picketing or bannering can be banned by contract'' (G.C. Exh. 10, p. 2). Engeman's letter sets forth citations to authorities, but they are omitted at this juncture because I conclude they do not enhance my factual description.

As to other items in the Union's ''final'' proposal, Engeman's May 26 letter rejects: (a) a single 2-year agreement and (b) an across-the-board 4-percent wage increase, while renewing the Employer's proposal to establish a management/staff committee or use the negotiating committees to ''listen to any proposal for an agreement on wages and benefits consistent with the budgetary realities with which our staff personnel are well familiar.''

Engeman's May 26 letter observes the Union has abandoned its insistence on compulsory membership or compulsory dues payments. Engeman wrote ''This is appropriate and acceptable to the . . . [Employer].''

The May 26 letter concludes with the following paragraph: ''It seems to us that we should resolve the remaining critical issues of duration, wage/benefit levels/costs, units/contracts and the assurance that the . . . [Employer] . . . and its staff will not have its funding sources coerced or cut off during or after any agreement(s) as our first priority. *If you can confirm your acceptance of the . . . [Employer's] . . . positions expressed above on these issues, we will be glad to review the subsidiary language issues that may remain to propose workable solutions to them when these major items are out of the way*. Please give me your response at your earliest convenience.'' (Jt. Exh. 10, pp. 3–4, emphasis added.)

Callahan answered Engeman's May 26 letter with a letter of his own dated June 13 (Jt. Exh. 11). Callahan's letter calls the Employer's proposal to forbid the Union from exerting influence upon funding sources ''ridiculous.''

Callahan's June 13 letter then sets forth citations to legal authority which he claims holds attempts to control the political activity of the Union and its members to force their acceptance of an employer's position on public affairs to be a nonmandatory bargaining subject. Also cited are cases which Callahan wrote establish that well-founded criticism in the public interest is protected activity and that employees are entitled to express their own beliefs on matters of public concern.

Callahan concluded his June 13 letter by writing the Employer's proposal is an attempted restraint upon concerted political activity and, as such, is a nonmandatory bargaining subject. Callahan called on Engeman to withdraw the disputed proposal and asked Engeman to call him to schedule a meeting to do so.

No action was taken by Engeman on Callahan's June 13 letter. It had been received on June 14, but Engeman had already dispatched his own letter (Jt. Exh. 12) dated June 14 to Callahan. Engeman's June 14 letter withdrew the Employer's recognition of the Union as collective-bargaining agent for employees in both certified units.[5] The parties have not met for negotiating purposes since May 16.

2. Analysis

a. *The character of the disputed proposal*

Resolution of one aspect of the complaint allegations depends on whether or not the Employer's disputed proposal is a mandatory subject for collective bargaining. A party to collective bargaining engages in bad-faith bargaining by advancing a nonmandatory subject of bargaining to impasse. Conversely, insistence to impasse upon acceptance of a mandatory subject does not constitute a refusal to bargain in violation of Section 8(a) (5) and (1) of the Act. *NLRB v. Borg-Warner Corp*., 356 U.S. 342 (1958).

No party has cited authority which explicitly declares a proposal such as that under consideration a mandatory or nonmandatory bargaining subject. My independent research has uncovered no such authority. I must be guided by general principles. Clearly, the Board has broad authority to decide the nature of collective-bargaining proposals. *Ford Motor Co. (Chicago Stamping Plant) v. NLRB*, 441 U.S. 488, 496 (1979). The Supreme Court has recognized the Board possesses ''special expertise'' concerning the matter of classifying bargaining subjects. *Meat Cutters v. Jewel Tea Co*., 381 U.S. 676, 685–686 (1965).

In *Ford Motor*, supra, the Court observed: ''National labor policy contemplates that areas of common dispute between employers and employees be funnelled into collective bargaining. The assumption is that this is preferable to allowing recurring disputes to fester outside the negotiation process until strikes or other forms of economic warfare occur'' 441 U.S. at 499. Of course, the ''areas of common dispute'' to which the Court referred reasonably must fall within the Act's framework for imposition of a bargaining obligation when the subject matter relates to ''wages, hours and *other terms and conditions of employment*'' (Sec. 8(d) of the Act, emphasis added).

The General Counsel's theory of violation, enunciated in her posthearing brief, is based on the claim that the Employer's proposal that the Union agree to refrain from ''any attempt to restrain, coerce or otherwise influence any actual or potential funding source for the . . . [Employer] . . . or any actual or potential client'' (par. 7(a), complaint) constitutes a nonmandatory bargaining subject.

The General Counsel, in effect, asserts the disputed proposal is not encompassed in the category of ''other terms and conditions of employment.'' Specifically, General Counsel contends the proposal (1) ''seeks, in essence, the waiver of constitutional rights to engage in political activities'' (G.C. br., p. 10); and (2) is like so-called industry promotion funds which have been declared nonmandatory bargaining subjects because ''they are outside the employment relationship, since they concern themselves 'with the relationship of employers with one another.'' In support, General Counsel cites *Sheet Metal Workers Local 38 (Elmsford Sheet Metal*), 231 NLRB 699, 700 fn. 4 (1977), enfd. 575 F.2d 394 (2d Cir. 1978)

[5] The issue of withdrawal of recognition will be discussed separately in sec. III, C, below.

which, in turn, cited *Mills Floor Covering*, 136 NLRB 769, 771 (1962), enfd. 317 F.2d 269 (6th Cir. 1963).

The Employer principally argues the disputed language is (1) analogous to a no-strike clause which long has been recognized to be a mandatory bargaining subject under such cases as *Lloyd A. Fry Roofing Co*., 123 NLRB 647, 649 (1959), and *Shell Oil Co*., 77 NLRB 1306 (1948); and (2) is necessary to preserve its very existence as an employing entity and so is directly concerned with the employment relationship.

A decision whether or not the disputed Employer proposal is a mandatory bargaining subject is not easily made. There is evidence which supports each litigant's contentions. However, on balance, I am persuaded that the particular circumstances of this case militate in favor of finding the proposal is a mandatory subject.

I find the following factors persuasive.

1. The *Ford Motor* supra, criteria exist in the instant case. In *Ford Motor*, the Supreme Court, in relevant part, observed that the matter under consideration was of deep concern to workers, was germane to the working environment, and caused substantial disputes between management and labor, as the Court held that inplant food prices and services were mandatory bargaining subjects.

Workers' deep concern over the Employer's proposal of the disputed language is manifest by Callahan's March appearance before the County Board, his written solicitations of Cincinnati AFL–CIO and individual union members to support the Union's cause, and his own counterproposal which committed the Union to support mental health levies during the term of a collective-bargaining agreement.

Relevance to the working environment surfaces from an analysis of the ultimate result of each party's adherence to its position. If the Employer suffered little or no interference with operational funding, the employees' jobs and, perhaps, wages and other benefits could be assured and even enhanced. If the Union's opposition to a levy were effective, the entire working environment could be destroyed and the employees could lose their jobs with this Employer.

That the subject matter of the disputed language is the basis for substantial disagreement is self-evident from the treatment each party accorded the other during bargaining over the subject, their intractable positions, and the forceful character of the instant litigation.

The disputed language was proposed as protection against renewal of the Union's December 1987 attempt to interfere with the Employer's operational funding. Callahan's visit to the County Board that month set forth the first threat of the Union's intent to block voter approval of the mental health levy.

Later, it is apparent the Union's attack was broadened. In fact, its breadth leads me to conclude the attack was designed to cut the Employer off from virtually all funding. Consequently, the Employer could suffer its demise, not merely be crippled. The Union's conduct clearly suggests its intent to accomplish this very result.

Callahan's March 28 letter (R. Exh. 4) to the Cincinnati AFL–CIO states: ''I want to make our position clear—if the . . . [County Board] . . . refuses to intervene and help settle . . . [our dispute with the Employer] . . . we will sign these substandard contracts. However . . . we will also be irrevocably and unequivocally committed *to killing* the levy in 1990. . . . I hope that we can make clear to the . . . [County Board] . . . the severity and finality of our position.'' (Emphasis added.)

I recognize my interpretation of the Union's intent could be flawed as illogical. Responsible labor organizations normally would not engage in such self-destructive activity as my interpretation suggests. In fact, Callahan testified he actually made that point to the Employer. Nonetheless, my judgment is persuaded by the emphasized words within the above excerpt from Callahan's March 28 letter. Those words, in their context, provide insight to the Union's true intentions. They, read within the framework of the sentence in which they appear, foretell retaliatory action against the Employer even after a collective-bargaining agreement is signed.

In this light, I view the Union's position to be more than mere bargaining rhetoric or posturing. I simply cannot say the Employer was not justified in seeking to negotiate protective language to avert financial disaster. It is such an effort which tends to make the disputed language a mandatory bargaining subject.

Even General Counsel acknowledges that ''concededly a cutoff of public funding would cause substantial disruption to . . . [the Employer's] . . . enterprise'' (Br. p.10). Nevertheless, she argues the disputed language ''neither affects nor relates to the actual employment relationship existing between . . . [the Employer] . . . and its employees.'' The General Counsel claims the Union's warning about opposition to the levy was a legitimate exercise of Section 7 rights as peaceful and noncoercive appeals to the public, citing *40-41 Realty Associates, 288 NLRB 200, 202 (1988).*

I find material distinctions between *40-41 Realty* and the case at bar. No dispute existed in *40-41 Realty* concerning the character of a bargaining proposal. The principal question related to the protected nature of a union's picketing in support of an economic strike. The pivotal issue was whether the union's picketing at certain locations of the employer's facility was an excessive infringement on the employer's property rights. I can find nothing in *40-41 Realty* even suggestive of the possibility the picketing could have so severely impacted on the employer as to cause it to totally terminate its operations. That is the case here.

I recognize that in *40-41 Realty* the union wrote letters similar to those in the instant case soliciting the support of other unions. Specifically, in *40-41 Realty*, the striking union asked the membership of other unions to exert pressure on the struck employer. However, *40-41 Realty* contains no evidence that the union sought the aid of the struck employer's funding source to exert such pressure to the degree present in the instant case. It is an economic reality that every lawful primary strike by employees against their employer is designed to persuade customers to do business elsewhere. In that sense, *40-41 Realty* parallels the case here. But that similarity is quite limited.

The Employer here is virtually dependent on the mental health levy for its financial viability. The struck employer (a dental clinic) in *40-41 Realty* had about 10,000 customers (patients), about 90 percent of whom had insurance coverage. There was no evidence that the union sought to exert separate pressure, apart from its picketing, on the insurance carriers. Had it done so, I would regard that situation analogous to the instant case.

In my view, the enmeshing of the County Board by the Union here tends to diminish the strength of General Counsel's contention that the Union was engaged in such activity recognized protected by the statute (the Act) as to render the Employer's disputed proposal a nonmandatory bargaining subject.

All the circumstances of this case convince me the disputed language is more akin to a no-strike clause than to an industry promotion fund. Industry promotion funds which, as described above, have been held nonmandatory bargaining subjects, do not directly affect the very existence of the employing entity. Here, as discussed above, the Union's interference can reach the point of preventing the Employer from producing its services and literally close it down.

The collective bargaining involved in negotiating industry promotion fund provisions entails discussion over matters ''which might conceivably enhance the prospects of the industry'' (*Mills Floor Covering*, supra). Those provisions focus on employers' public business image. They do not directly affect employees.

In contrast, the underlying focus of the instant Employer's disputed proposal is the protection of its very existence as an employing entity. Should it cease to exist, the fundamental employer-employee relationship also will end. Accordingly, I find the disputed proposal sufficiently concerns itself with the employment relationship as to make it a mandatory bargaining subject.

2. The allegation that the disputed language is unlawful is based on a narrow construction of the words and is taken out of context.

I consider it important to note the quoted language which allegedly makes the proposal a nonmandatory subject is only part of one of the sentences the Employer proposed as article IV, section 4 of the Responsibility of Parties provision.

The entire sentence, as proposed on February 29, reads: ''The Union recognizes that neither it nor the employees will *interfere with the ability of the Employer to provide services* by any attempt to restrain, coerce or otherwise influence any actual or potential funding source for the . . . [Employer] . . . or any actual or potential client.'' (Emphasis added.)

When the disputed language is read in the context of the Employer's Responsibility of Parties proposal, its alleged unlawful tenor is dissipated. In fact, the disputed language is modified by its antecedent phrase, the plain words of which show the prohibition of influence on funding sources related only to such influence intended to interfere ''with the ability of the Employer to provide services.'' I cannot subscribe to the General Counsel's assertion that the disputed language extends to prohibit the Union or its members from freely exercising their political rights in other respects.

The words ''provide services'' in the disputed proposal are the functional equivalent of the words ''production, or other work'' in the *Lloyd A. Fry Roofing*, supra, no-strike clause. By parity of reasoning, I find the Employer's disputed language the functional counterpart of the *Lloyd A. Fry Roofing* no-strike clause. In each case the operative factor making the language a mandatory bargaining subject is the patent effect on the affected employees' wages, hours, and other terms and conditions of employment in the event of interference with the employer's ability to maintain its status as an employing entity.

Upon all the above discussion relative to the disputed proposal's characteristics, I conclude that proposal sufficiently concerns itself with the employment relationship as to make it a mandatory bargaining subject in all the circumstances of this case. It follows that I also find the Employer did not violate Section 8(a)(5) and (1) of the Act by proposing the disputed language or by insisting on its acceptance in any of the forms proposed.

b. *The impasse issue*

My conclusion that the disputed language was a mandatory bargaining subject eliminates the need to decide whether an impasse existed, because it is not unlawful to insist to impasse upon acceptance of proposals on mandatory bargaining subjects.

However, if my decision regarding the disputed language is overruled by an appellate tribunal, then it is important to determine whether an impasse existed. I find there was an impasse after May 26.

As previously indicated, the General Counsel contends the Employer insisted on the Union's acceptance of the disputed language as a condition of reaching agreement on a collective-bargaining contract. Such insistence, upon what the General Counsel claims is a nonmandatory bargaining subject (contrary to my findings) is alleged as a violation of Section 8(a)(5) and (1) of the Act.

The Employer, referring to the various revisions of the disputed language and to its expressions of willingness to review the Union's legal authorities, asserts no impasse existed principally because the evidence does not allow a conclusion that further bargaining between the parties would have been futile.

The existence of an impasse is a matter left to the judgment of the trier of fact. *Taft Broadcasting Co*., 163 NLRB 475, 478 (1967), affd. 395 F.2d 622 (D.C. Cir. 1968). A variety of factors enters into a decision as to whether an impasse in bargaining is present in any particular circumstances.

Relevant factors in the case before me are: (a) to what extent the parties have maintained rigid positions (*Loud Stechers Supermarkets*, 275 NLRB 475 (1985); *Triple A Maintenance Corp*., 283 NLRB 44 (1987)); (b) whether there is a possibility of agreement through compromise (*Union Terminal Warehouse*, 286 NLRB 851 (1987)); whether both parties mutually understand they are at impasse (*Colfor, Inc*., 282 NLRB 1173 (1987), enfd. 838 F.2d 164 (6th Cir. 1988)); and (d) whether it reasonably can be concluded that further bargaining would be futile (*Alsey Refractories Co*., 215 NLRB 785 fn. 2 (1974)).

A summary of the salient evidence shows:

February 13: Employer first proposed a management-rights clause which contained a sentence by which the Union would commit itself to cooperate with the Employer's exercise of its management rights. The Union questioned what this precisely entailed.

February 22: Management-rights clause renamed ''Responsibility of the Parties.'' Disputed language appeared for the first time, asking for Union's commitment not to attempt to influence funding sources before, during, or after the term of any collective-bargaining agreement being negotiated.

February 29: Employer altered disputed language to make it applicable only during term of a collective-bargaining agreement.

Although the Union made it clear there had to be a contract without prohibitions on ''political'' activity, and the Employer suggested both parties research the mandatory character of its proposal, it is clear the Employer did not withdraw the disputed language as a proposal.

In fact, the Employer rejected the Union's offer of language by which the Union would support levies when Engeman said that the Union's proposal was not going to be the basis for agreement.

May 16: Union presented a ''final'' proposal. Engeman's comments about the nature of the Union's publicity campaign since the parties' February 29 meeting and Callahan's March appearance at the County Board, reflect the Employer was as adamant as ever regarding the inclusion of the disputed proposal in some form.

Specifically, Engeman said the contract's term would extend beyond the date scheduled for the 1990 levy and if there were any way he could stop the Union from disruption of mental health services he would do so.

May 26: Employer made written response to Union's ''final'' proposal. That response indicates the Employer's willingness to review the Union's legal authorities.

However, the response also contained the following positions: (a) the Employer's proposal of disputed language is a mandatory bargaining subject; (b) acceptance of language which limited activity designed to influence the funding sources was the Employer's highest priority issue; and (c) the Union's ''confirm(ation) of . . . (its) . . . acceptance of'' the Employer's disputed proposal (among others) was required before another negotiating session would be scheduled. (The quoted language appears in the final paragraph of Jt. Exh. 10.)

June 13: Union's written response to Employer's May 26 positions (1) called them ''ridiculous''; (2) reiterated the disputed subject was nonmandatory; (3) demanded that proposal be withdrawn; and (4) requested the parties meet for the purpose of accomplishing the withdrawal.

I find the evidence leads to a virtually inescapable conclusion that each party maintained an intractable, rigid position concerning the disputed proposal throughout the negotiations. Ostensibly, my summary of negotiations shows Employer movement on the disputed subject. But close scrutiny reveals (as General Counsel urges) that the alterations of the Employer's positions merely were cosmetic.

For example, the February 29 proposal to make the disputed proposal effective only for the length of a collective-bargaining agreement is not a substantive change. That revision simply curtails the period the disputed proposal would be implemented. It does not relieve the Union or its members from the commitment to refrain from attempts to influence the Employer's funding sources.

Similarly, the Employer's May 16 proposal to settle on an agreement which would expire after the 1990 levy effected no substantive revision of the disputed proposal. Indeed, I conclude the offer of this termination date actually solidified the Employer's insistence that a collective-bargaining agreement needed to contain some form of the disputed proposal. Engeman expressed such an intent when, on May 16, he said if there were any way the Employer could prevent the Union from disrupting funding sources, it would do so.

Arguably, the seemingly conciliatory invitation of Engeman's May 26 letter in which he indicates the Employer would review the Union's legal authorities shows the issue has not yet been foreclosed and suggests (at least by implication) the Employer possibly could be convinced to change its demand for inclusion of the disputed provision in a contract. But, such an interpretation is negated by the concluding statements in the May 26 letter.

I find the language of the final paragraph of the May 26 letter makes the Employer's offer to review legal authorities illusory. That last paragraph contains language which plainly conditions further collective bargaining on the Union's ''confirmation'' of its acceptance of the disputed proposal.

I conclude the above factors show the Employer maintained a rigid position on the disputed proposal.

As noted, I find the Union's positions no less inflexible. It never wavered from the contention that the disputed subject matter was nonmandatory. Callahan's consistent position at the bargaining sessions was that the Union positively would not agree to any form of the disputed proposal; and his conduct away from the bargaining table displays the strength of his conviction. Thus, Callahan continued to exert pressure on the County Board and issued strongly worded solicitations for assistance from other union sources.

I do not find the February 22 offer that the Union agree to support levies during the contract term a basis for holding that the Union's position had changed in a substantive way. Notwithstanding that union proposal, the evidence shows the Union never once varied from its immediate and total rejection of any of the formulations of the Employer's disputed proposal, each of which had been couched in negative terms limiting the Union's conduct.

The foregoing discussion persuades me that the evidence demonstrates the kind of rigid adherence to positions by both parties which supports a conclusion they were at a bargaining impasse.

I also conclude the record shows there was no possibility of agreement through compromise. In my view, the totality of circumstances reflects a pervasive undercurrent of disagreement on the disputed proposal. In the one instance, on February 22, where the Union proposed positive language of support for levies, the Employer swiftly rejected it on February 29 with Engeman saying that the Union's proposal was not going to form the basis of any agreement; and later, on May 16, returned to reiterate the Employer's insistence on the acceptance of the disputed proposal.

Further, I conclude the record shows that continued bargaining after May 26 would have been futile. First, I have already found that Engeman's May 26 letter conditioned further bargaining on the Union's acceptance of the disputed proposal.

I now find the Union's last-taken position connotes the futility of bargaining. That position is contained in Callahan's June 13 letter. In my view, Callahan's call for the Employer's withdrawal of its disputed proposal, and a meeting at which that will occur, is tantamount to a declaration that no additional bargaining can take place until the disputed proposal has been withdrawn. The combination of these two most recent positions of the parties is convincing evidence of the futility of the situation.

Finally, I find the record as a whole supports a finding that the parties mutually did understand, or could have, that they had bargained to impasse. I concede there is no direct evidence that the parties believed or understood an impasse had been reached. There is no evidence the parties explicitly discussed the impasse issue between themselves.

Nonetheless, I conclude each party reasonably could have inferred an impasse existed from the attendant circumstances more fully described above. In particular, the Employer's May 26 renewed adamant insistence on acceptance of its proposal and the Union's June 13 response that the Employer's proposal was ''ridiculous'' and demand for its withdrawal are strong indicators of a mutual understanding an impasse was at hand.

My overview of all the relevant evidence regarding the impasse issue leads me to conclude this case presents a classic portrayal of the proverbial image of the irresistible force meeting the immovable object. Accordingly, I find the evidence sustains a conclusion an impasse in the parties' bargaining existed on and after May 26.

C. *The Withdrawal of Recognition*

1. The facts

Some time in late winter or early spring 1988, bargaining unit employee Grady A. Gausmann told O'Bryan (the Employer's executive director) he was unhappy with the Union. Gausmann also told O'Bryan a number of other employees felt the same. Gausmann asked O'Bryan if there was anything the employees could do to get rid of the Union.

After consulting the Employer's attorney, O'Bryan told Gausmann management could do nothing to assist the employees; that nothing at all could be done by anyone during the first year following the Union's certification; but that the staff could petition for the Union's removal after that year had passed if no collective-bargaining agreement had become effective.

Gausmann spoke to O'Bryan again in late May and asked whether the certification year had expired. O'Bryan said it had. Gausmann told O'Bryan he was going to circulate a petition among the staff.

On June 2, Gausmann came to O'Bryan's office and presented him with a petition which was undated, contained signatures of 23 bargaining unit employees; and an introductory statement which reads: ''We the undersigned feel that we do not want to be represented by Local Union 1199. And would like to call for a recertification vote.''

Gausmann told O'Bryan other employees were opposed to the Union but did not sign the petition because they did not want their union friends to see their signatures on it.

When the petition was presented, the professional bargaining unit contained about 45 employees[6] and there were 4 employees in the clerical unit (see R. Exh. 10). Of the 23 employees whose signatures appear on the petition, 19 were in the professional unit and 4 were in the clerical unit.

[6] The General Counsel claims the number is 45, but the Employer asserts there were 44 employees in this unit. The differences are due to the fact that employee C. J. Vradelis, who actually stopped working on May 13, continued to be carried on the payroll while collecting vacation benefits. In any event, my findings and conclusions on the instant issue are not affected by the asserted differences in size of this unit.

On June 3, O'Bryan phoned Gausmann and asked him many employees had told him they were opposed to the Union. Gausmann replied by actually naming 5 additional employees.

O'Bryan then asked the supervisory staff whether any employees told them they were unhappy with the Union. Three of the 12 supervisors reported, in O'Bryan's words, ''that on various occasions staff had come to them saying they were unhappy with the Union and that the majority of the staff was unhappy with the Union and wanted it to be removed'' (Tr. 61). O'Bryan did not identify the employees who purportedly said these things to the supervisors, and none of the supervisors appeared as a witness in the instant proceedings.

This scenario of events was the basis for Engeman's June 14 letter (Jt. Exh. 12) in which recognition was withdrawn from the Union as collective-bargaining representative for the employees in both certified units.

2. Analysis

An incumbent labor organization enjoys a presumption that its certified majority status continues through the so-called certification year and after the expiration of its collective-bargaining agreement. Thereafter, the presumption becomes rebuttable. *Club Cal Neva*, 231 NLRB 22 (1977), enfd. 604 F.2d 606 (9th Cir. 1979); *Stratford Visiting Nurses Assn.*, 264 NLRB 1026 (1982). Such rebuttal may be accomplished by the interposition of an employer's good-faith doubt the union enjoys its majority status.

The Board, in *Celanese Corp.*, 95 NLRB 664, 673 (1951), established two factors essential to a finding that an employer acts in good faith when raising the majority issue in cases where a union had been certified. Those factors are (1) the employer must have reasonable ground for believing the union lost its majority status since its certification, and (2) the majority issue must be raised in a context free of illegal antiunion activity or other conduct aimed at causing disaffection or indicating that the issue was raised merely to give the employer time to undermine the union.

The General Counsel, citing *Terrell Machine Co.*, 173 NLRB 1480, 1481 (1969), enfd. 427 F.2d 1088 (4th Cir. 1970), contends the Employer's withdrawal of recognition is unlawful because it was not based on a showing that the Union actually lost its majority status or on valid objective considerations which give rise to a bona fide good-faith doubt of such majority status.

Also, General Counsel claims the Employer is precluded from asserting it had a good-faith doubt of the Union's majority status because the Employer engaged in unfair labor practices (insistence on nonmandatory bargaining subject) to impasse and such unlawful conduct caused employee disaffection from the Union.

The Employer urges its withdrawal of recognition conforms precisely with the applicable legal standards described in *Terrell Machine*, supra, and more recently enunciated by the Board in *Burger Pits, Inc.*, 273 NLRB 1001 (1984), and *Master Slack Corp.*, 271 NLRB 78 (1984). Specifically, the Employer claims it has a good-faith doubt that the Union maintained its majority status when Gausmann presented the petition. (The certification year expired May 21.)

The Employer's good-faith doubt claim is based on the combination of (1) the June 2 petition, (2) Gausmann's June 2 and 3 statements to O'Bryan that employees other than

those who signed the petition supported it and his identification of five employees in that category, and (3) the reports of the three supervisors regarding employees' desires to remove the Union.

In my view, the guiding legal principles, the parties' contentions, and the specific facts of this case, require that I separately analyze the withdrawal of recognition as to each bargaining unit—the clerical unit and the professional unit.

Regarding the clerical unit, the Employer asserts that the petition, alone, provided a valid basis for its good-faith doubt of the Union's majority status among the clerical unit. It is uncontested that the petition contains the signatures of all four employees within that bargaining unit.

General Counsel does not expressly deal separately with this condition. Instead, she apparently relies on the holdings in *Celanese Corp*., supra, and *Guerdon Industries*, 218 NLRB 658, 661 (1975), which render such employee expressions of union disaffection invalid support for a good-faith doubt in the context of employer unfair labor practices.

Inasmuch as I have found the Employer did not engage in the alleged unlawful insistence to impasse on a nonmandatory bargaining subject, and the withdrawal of recognition concerning the clerical unit was based on a showing that 100 percent of employees in that unit signed the petition,[7] I conclude withdrawal of recognition from the Union as representative of the clerical unit employees was based on the Employer's good-faith doubt of the Union's majority status.

However, the situation regarding the professional unit is different. The petition itself does not contain signatures of even a majority of employees in that unit, whether its size is 44 or 45 employees. (Twenty-three employees comprise a majority of this unit.)

The Employer, citing *U-Save Food Warehouse*, 271 NLRB 710 (1984), as directly in point, urges that it may, and did, rely on Gausmann's June 3 identification of five additional professional/service employees whose antiunion sentiments were the same as signatories to the petition to compute the absence or existence of the Union's majority status. If legitimately added to the 19 signatures, there would be evidence of union disaffection from 24 professional unit employees. This is one employee more than needed to show a numerical majority of unit employees were unhappy with the Union.

I recognize the Employer is only required to show it had objective reasons to doubt the Union's majority, and need not prove the Union actually lost a numerical majority (see *Sofco, Inc*., 268 NLRB 159, 159–160 (1983): *Laystrom Mfg. Co*., 151 NLRB 1482 (1965), enf. denied on other grounds 359 F.2d 799 (7th Cir. 1966)). Here, however, the Employer's asserted knowledge that a total of 24 employees did not want the Union to represent them is the sole factor which is claimed to justify its asserted good-faith doubt.

The General Counsel, relying on *KEZI–TV*, 286 NLRB 1396 (1987), argues Gausmann's report regarding the sentiments of the five employees whom he named are hearsay assertions which may not be relied on to establish a claim of good-faith doubt of majority union status.

In *KEZI–TV*, as here, there was no backdrop of employer unfair labor practices; the petition which had been presented to the employer did not contain a numerical majority of signatures of unit employees; the solicitor of the petition's signatures told a management official he had received ''feedback'' from other unit employees that they felt the same as the signatories but would not sign the petition because they were afraid of ''peer pressure''; and no other unit employees directly communicated their sentiments to members of management.[8]

In *KEZI–TV*, the Board held, ''in the circumstances of this case, the petition, either standing alone or taken together with other factors relied on by the Respondent, is not sufficient to establish a good-faith doubt of the Union's continuing majority status'' (286 NLRB 1396 fn. 1).

Gausmann's explicit identification of five additional unit employees purportedly with views identical to petition signatories does not create a sufficient distinction between *KEZI–TV* and the instant case to render the Board's quoted observation inapplicable. The Employer's reliance on *U-Save Food Warehouse*, supra, does not, in my opinion, warrant the addition of those five employees as support for the good-faith claim.

Granted, as the Employer argues, the Board, in *U-Save Food Warehouse*, left undisturbed Judge Thomas R. Wilks' acceptance of a report to management by a bargaining unit employee that three other unit employees had told him they did not want to be represented by their union. However, *U-Save Food Warehouse*, I find contains material distinctions from the case at bar.

First, in *U-Save Food Warehouse*, there was considerable evidence of cumulative circumstances which established an atmosphere of employee discontent with their collective-bargaining representative. That atmosphere was notorious and the evidence showed it had been brought directly to the attention of managerial officials several months before recognition had been withdrawn. The evidence in *U-Save Food Warehouse*, showed that the employer knew that employee complaints festered over such things as a failure to receive a wage increase, a collective-bargaining hiatus, and a failure of union agents to be on hand to service their needs.

In marked contrast, the instant record contains no such background. Viewing this case in a light most favorable to the Employer, it is the June 2 petition which comprises the first express disclaimer of interest in representation by the Union which officially came to the Employer's attention.[9]

U-Save Food Warehouse contains a second important distinction. There, the information concerning antiunion sentiment was conveyed to the employer's president from an individual (Ibarra) who acted in a dual role. He was both meat department manager and meatcutter, the latter being a bargaining unit position. It is not clear whether Ibarra was a statutory supervisor when he functioned as meat department manager. Even if he were not a supervisor, there is abundant evidence that he was the employer's agent.

[7] I shall find below, contrary to General Counsel's claim, that the introductory language on the petition unambiguously reflects the signatories do not want the Union to represent them.

[8] With respect to the last factor, I find the instant case analogous because I conclude there is no probative value to O'Bryan's extremely generalized, and patently hearsay, testimony concerning the similarly generalized reports he received from the three supervisors. *Atlanta Hilton & Towers*, 278 NLRB 474, 481 (1986)).

[9] I reject the General Counsel's argument the petition's language is ambiguous because its second sentence requests a ''recertification'' vote. In the first sentence, the employees plainly and clearly state they do not want the Union (by name) to represent them. In context, I consider the second sentence merely an inartful suggestion of how to achieve the first sentence's intended result.

Once again, the instant case is vastly different. There is no assertion, and no party adduced evidence to show, that Gausmann was either the Employer's supervisor, managerial employee, or agent. In this context, Gausmann's June 3 report regarding how the other five employees felt is entitled only to little weight. (*Golden State Habilitation Convalescent Center*, 224 NLRB 1618 (1976).) Here, the Employer's reliance on Gausmann's report is necessarily heavy. It forms the underpinnings of the Employer's assertion that it had a valid objective basis to form a good-faith doubt of the Union's majority status.

Summarizing, I find the instant case more nearly like KEZI–TV than *U-Save Food Warehouse*. In the absence of background evidence on which the Employer reasonably could have relied to create its asserted good-faith doubt; and absent a showing Gausmann had any relationship to the Employer but bargaining unit employee, I conclude the instant petition, in virtual isolation, is an insufficient supporting foundation for the Employer's withdrawal of recognition from the Union as collective-bargaining agent of the employees in the professional/service unit. Accordingly, I find the Employer refused to bargain in violation of Section 8(a)(5) and (1) of the Act when it withdrew recognition of the Union as to this bargaining unit.

On the basis of the above findings of fact and on the entire record in the case, I make the following

CONCLUSIONS OF LAW

1. Mental Health Services, Northwest, Inc. is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. District 1199, WV/KY/OH, National Union of Hospital and Health Care Employees, AFL–CIO is a labor organization within the meaning of Section 2(5) of the Act.

3. All the Employer's full-time and regular part-time professional and nonprofessional employees employed at the Employer's mental health facilities at locations in and around Cincinnati, Ohio, excluding office clerical employees, management employees, guards and supervisors as defined in the Act constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

4. All the Employer's office clerical employees, excluding all confidential employees, supervisory employees, guards and all other employees, professional and nonprofessional, constitute a unit appropriate for collective bargaining within the meaning of Section 9(b) of the Act.

5. The Employer's proposal that the Union agree that neither it nor the bargaining unit employees would interfere with the Employer's ability to provide services by attempts to restrain, coerce, or otherwise influence the Employer's actual or potential funding sources or clients is a mandatory subject for collective bargaining.

6. The Employer did not refuse to bargain in violation of Section 8(a)(5) and (1) of the Act by proposing, or insisting on the Union's acceptance of, a provision by which the Union would agree not to interfere with the Employer's ability to provide services by attempts to restrain, coerce, or otherwise influence the Employer's actual or potential funding sources or clients.

7. There was an impasse in the parties' collective bargaining on and after May 26, 1988.

8. The Employer's withdrawal of recognition from the Union as collective-bargaining representative of the employees in the clerical unit was based on valid objective evidence and was not unlawful.

9. The Employer refused to bargain, in violation of Section 8(a)(5) and (1) of the Act when it withdrew recognition from the Union, on June 14, 1988, as collective-bargaining representative of the employees in the professional/service unit.

10. The unfair labor practice identified above in Conclusion of Law 9 affects commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that the Employer violated the Act with respect to its withdrawal of recognition from the Union in connection with the professional unit, I shall recommend that it be ordered to cease and desist therefrom and take certain affirmative action necessary to effectuate the purposes of the Act.

The Employer will be required to (1) recognize and, on request, bargain with the Union as the exclusive collective-bargaining representative of the employees in the professional unit, and (2) post an appropriate notice to employees.

[Recommended Order omitted from publication.]